IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION,
Plaintiff and Appellant,
vs.
CITY OF BIRMINGHAM, a Municipal Corporation, et al.,
Defendants and Appellees,
and
STATE OF MICHIGAN,
Intervening Defendant and Appellee.

BRIEF OF APPELLANT

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IN THE

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No. 755

MUNICIPAL INVESTORS ASSOCIATION, a Michigan Corporation,
Plaintiff and Appellant,

vs.

CITY OF BIRMINGHAM, a Municipal Corporation; THE COMMISSION OF THE CITY OF BIRMINGHAM; and JOHN E. MARTZ (Mayor) and RAY A. PALMER, WILLIAM C. ALLEE, RALPH I. CORYELL, LUTHER HEACOCK, HARRY BISSETT and WILMER E. MOODY (Commissioners), Members of the Commission of the City of Birmingham; and ELMER W. HAACK, Assessor of the City of Birmingham; and their respective successors in office,
Defendants and Appellees,

and

STATE OF MICHIGAN,
Intervening Defendant and Appellee

BRIEF OF APPELLANT

I.

OFFICIAL REPORT OF OPINIONS BELOW

This is an appeal from an order entered by the Supreme Court of the State of Michigan on June 30, 1941, denying to Plaintiff a Writ of Mandamus, which order was based upon opinions reported in 298 Michigan 314-330.

II.

JURISDICTION

The Appellant claims that this Court has jurisdiction under Title 28, Section 344, U.S.C.A., because of the following:

1. The order from which this appeal has been taken is a final judgment of the Supreme Court of the State of Michigan (the highest Court in that state in which a decision in the suit could be had), a proceeding for a Writ of Mandamus being a suit within the meaning of said section. *American Express Co. v. Michigan*, 177 U. S. 404, 406.

2. In said suit there was drawn in question the validity of certain 1937 and 1939 statutes of the State of Michigan (*) which as interpreted by the Supreme Court of that state cancel the contract right (**) of the plaintiff as the

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*The statutes, the constitutionality of which are questioned in this litigation, are the following in so far as they cancel plaintiff's right to an additional assessment under Section 15, Chapter XXI of the charter of the Village of Birmingham, to-wit:

(a) Act No. 206, Pub. Acts 1893, as amended, being the general property tax law of Michigan (1 Comp. Laws, 1929, Sections 3389 *et seq.* and Comp. Laws Supp. 1940, Sections 3389 *et seq.*) and particularly the amendments to Section 67 thereof embodied in Act No. 114, Pub. Acts, 1937 and Act No. 282, Pub. Acts, 1939 (Comp. Laws Supp. 1940, Section 3459).

(b) Act No. 155, Pub. Acts, 1937, as amended by Acts Nos. 29, 244 and 329, Pub. Acts, 1939, (Comp. Laws Supp. 1940, Sections 3723-1 to 3723-14) and particularly Sections 9 and 10 thereof (Comp. Laws Supp. 1940, Sections 3723-9 and 3723-10).

For a recital of the particular provisions see pages 11-12 of this brief.

**See Section 15, Chapter XXI of Village of Birmingham charter (R. 6).

holder of special assessment bonds, to an additional assessment to pay its bonds, said additional assessment being necessary because of the non-payment of a large part of the original assessments. The alidity of said statutes was questioned on the gro[illegible] of their being repugnant to the Constitution of th[illegible] United States, to-wit: that portion of Article 1, Section 10, prohibiting state laws impairing the obligation of contracts, and the 5th and 14th amendments prohibiting the taking of property without due process of law. Said constitutional questions were raised in the Plaintiff's Reply (R. 17-18), argued in the various briefs (Jur. Stat. 7) and decided by the Michigan Supreme Court (R. 22, 25).

3. The decision of the Michigan Supreme Court was in favor of the validity of said statutes.

4. The questions involved in this appeal are of a substantial nature. *Hamilton v. Regents of the University of California,* 293 U. S. 245, 258; *Senn v. Tile Layers Protective Union,* 301 U. S. 468, 476-7.

For a more detailed statement see jurisdictional statement heretofore filed and printed.

The only jurisdictional matters which would admit of argument are as to the [illegible]bstantial nature of the above constitutional questions, a discussion of which questions will take place later in this brief. This Court on December 15, 1941, ordered that further consideration of the question of jurisdiction be postponed until the hearing of the case on the merits. If the 1937 and 1939 state legislation did violate the contract and due process clauses of the Federal Constitution, then of course, this Court has jurisdiction. *Millsaps College v. City of Jackson,* 275 U. S. 129, 132.

III.

STATEMENT OF THE CASE

The Plaintiff as the holder of six defaulted bonds issued by the Village (now City) of Birmingham, Michigan, (R. 5) and payable solely from the collection of special assessments against lands in Special Assessment District No. 146 (R. 4, 9), filed its petition in the Supreme Court of the State of Michigan praying for a Writ of Mandamus to compel Defendants to levy an additional special assessment against said district to supply a deficiency in the funds available for the payment of its bonds. The facts are not in dispute and are set forth in the pleadings, upon which the case was heard in the state Court. The original Defendants are the City of Birmingham and the various officers who would be involved in the procedure for the levying of a deficiency special assessment. The Intervening Defendant is the State of Michigan which intervened through its Attorney General "in order to protect the interest of the State in the parcels of land involved" (R. 14). The Michigan Supreme Court on June 30, 1941, entered an order denying to plaintiff a Writ of Mandamus, from which order the appeal has been taken.

The Defendant, City of Birmingham, is a so-called Home Rule City operating under the provisions of Act No. 279, Pub. Acts, 1909, as amended, (1 Comp. Laws, 1929, Sections 2228 *et seq.*) and a charter adopted by the electors of said city on April 3, 1933 (R. 2). It succeeded the former Village of Birmingham which was a so-called Home Rule Village operating under the provisions of Act No. 278, Pub. Acts, 1909, as amended (1 Comp. Laws, 1929, Sections 1763 *et seq.*) and a charter adopted by the electors of said village on October 25, 1917 (R. 3). Upon the re-incorporation of the Village of Birmingham as the

City of Birmingham the latter assumed all the debts and liabilities of said village, both by reason of the terms of the city charter (R. 7) and the provisions of the City Home Rule Act (Comp. Laws Supp. 1940, Section 2250).

In 1928 the Village of Birmingham took procedings for the paving of portions of Washington Boulevard, Northlawn Drive and Southlawn Drive and assessed 23.4% of the cost thereof against the Village at large and 76.6% of such cost, or $17,742.10, against property in Special Assessment District No. 146. The amount so assessed against the district was made payable in 5 equal annual installments, the first installment becoming due in 1928 and the last installment in 1932 (R. 3).

The Village issued bonds in anticipation of the collection of these special assessments against the property in the special assessment district, in the principal sum of $17,000.00, dated October 1, 1928, bearing interest at 5½% per annum and maturing as follows: $4,000.00 on October 1, 1929, $3,000.00 on October 1, 1930, $4,000.00 on October 1, 1931, $3,000.00, on October 1, 1932, and $3,000.00 on October 1, 1933 (R. 3-4). The said bonds were payable solely from the collection of the special assessment against which they were issued. They were not an obligation of the village at large. The bonds themselves contained the following provision:

> "The full faith and credit of the Village of Birmingham are hereby pledged for the punctual payment of the principal and interest of this bond from the special assessment fund created for the purpose, when the same shall have been collected" (R. 9).

Section 22 of Chapter XX of the Village charter contained the following provisions relative to special assessment bonds, to-wit:

"Such bonds shall draw interest not exceeding six per cent per annum, as the commission may determine, and shall be payable out of the special assessment district fund when the assessment is collected" (R. 4).

Bonds Nos. 1 to 7, both inclusive, of said issue have been paid. Bonds Nos. 8 to 11, both inclusive, which matured on October 1, 1931, were refunded by refunding bonds Nos. 1 to 4, both inclusive, aggregating $4,000.00, dated October 1, 1931, and maturing in the years 1932 to 1935, both inclusive (R. 4). Bond Nos. 12 to 17, both inclusive of said original issue are still outstanding as are also bonds Nos. 1, 2 and 4 of said refunding issue, or a total of 9 bonds with an original par value of $9,000.00. $100.00 has been paid upon the principal of each of these bonds leaving the principal amount of $900.00 due upon each bond, or a total of $8,100.00, together with $3,675.23 of accrued interest as of January 1, 1941, or a total of $11,775.23. (R. 4). The amount on hand in the Special Assessment Fund is $25.67 and it is undisputed that future receipts from all sources (exclusive of a deficiency special assessment), will not exceed $2,000.00 (R. 5-6), an amount considerably less than the outstanding obligations.

Special Assessment District No. 146 was constituted of 88 lots in Birmingham Lincoln Lots Resubdivision and 18 lots (counting the West 75 feet of lots 85 and 86 as one) in Birmingham Lincoln Lots Subdivision (R. 6). Against the 88 lots in Birmingham Lincoln Lots Resubdivision $14,388.77 was assessed, none of which was ever paid. Against the 18 lots in Birmingham Lincoln Lots Subdivision $3,405.81 was assessed, which assessments were paid on nine and a fraction lots (R. 6).

Under the charters of both the former Village of Birmingham and the City of Birmingham delinquent

special assessments were returned to the County Treasurer and thereafter were subject to the provisions of the general tax laws of the state in respect to the collection thereof and also in respect to the sale and redemption of property for the non-payment thereof (R. 5). For statutory provisions governing return of delinquent taxes to County Treasurer, see 1 Comp. Laws 1929, Section 3446 and Comp. Laws Supp. 1940, Section 3446.

All of the 88 lots in Birmingham Lincoln Lots Resubdivision and the eight and a fraction lots in Birmingham Lincoln Lots Subdivision, upon which the assessments were not paid, were offered for sale at the annual tax sale in the month of May in the year 1938 and were bid in to the State of Michigan for lack of any other bid (R. 13). (Comp. Laws Supp. 1940, Section 3451 and 3462). These lots were not redeemed from such sale within the 18 months' redemption period, (Comp. Laws Supp. 1940, Section 3467) whereupon the title to said lots passed to the State of Michigan on November 3, 1939 (Comp. Laws Supp. 1940, Sections 3459 and 3459-1). Said lots were later offered for sale in accordance with the provisions of Act No. 155 of the Public Acts of 1937, as amended (Comp. Laws Supp. 1940, Sections 3723-1 to 3723-14) (*)

*Act 155, Pub. Acts, 1937, created the State Land Office Board and gave it jurisdiction over such lands as are located in the southern half of the lower peninsula, the title to which become vested in the State of Michigan by virtue of tax sales. The act provided that beginning on February 1st following the expiration of the period of redemption (at which expiration title vested in the state), the State Land Office Board should sell the lands so acquired by the state to the highest bidder at not less than 25% of the assessed valuation as fixed at the last assessment for the year preceding the vesting of title in the state. The act gave persons having an interest in such lands at the time of the tax sale, the right to meet any accepted bid within thirty days thereafter and also the right to purchase upon contract with

and were all purchased at the statutory minimum price of 25% of their assessed valuation (Comp. Laws Supp. 1940, Sections 3723-7), and (with a possible exception of 6 lots in the Birmingham Lincoln Lots Subdivision, which the State of Michigan alleges were sold to strangers to the title (R. 14-15) were sold to the former owners thereof (R. 13), i.e., those who held an interest in such lands at the time of the tax sale in 1938.

Section 15 of Chapter XXI of the charter of the Village of Birmingham, which was the charter in force at the time of the issuance of the bonds in question, contained the following provision:

> "Section 15. Should any special assessment prove insufficient to pay for the improvement or work for which it was levied, and the expenses incident thereto, the Commission may make additional pro rata assessment to cover the deficiency; and in case a larger amount shall have been collected than was necessary, the excess shall be refunded ratably to those by whom it was paid" (R. 6).

On January 20, 1941, a demand was made on behalf of Plaintiff upon the City Commission for an additional assessment against the lands in Special Assessment

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installments to be paid over a period not to exceed ten years. Section 9 of the act provides that "any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any incumbrances except as herein otherwise provided" (Comp. Laws Supp. 1940, Section 3723-9). Section 10 provides that money received from sales under the act "shall be paid to the several tax assessing units. * * * in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act, * * *. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the State of Michigan" (Comp. Laws Supp. 1940, Section 3723-10).

District No. 146 in an amount sufficient to pay the principal and interest on the outstanding bonds pertaining to said special assessment district (R. 7, 10). This demand was denied by resolution of said City Commission (R. 11). The Plaintiff on February 7, 1941, filed its petition in the Supreme Court of the State of Michigan praying for a Writ of Mandamus against the Defendants commanding them to make an additional assessment against Special Assessment District No. 146 in an amount sufficient to pay the principal and interest on the outstanding bonds pertaining to said district. The Defendants filed their Answer admitting the various facts set forth in the petition but interposed the legal defense that the major portion of the lots in the special assessment district were not subject to an additional assessment; that said lots had been sold to the state at the 1938 tax sale, were not redeemed within the 18 months' redemption period, and were then sold by the state under the provisions of Act No. 155, Pub. Acts, 1937, as amended, as a result of which the right to an additional assessment had been cancelled by the terms of the statutes governing such sales (R. 13).

Later in the proceedings the State of Michigan through its Attorney General intervened and filed an answer setting forth substantially the same legal defense as that set forth by the original Defendants (R. 14-17).

It was the claim of the Plaintiff in the Michigan Supreme Court that the 1937 and 1939 legislation upon which the above defense was based, and which changed the pre-existing law, was unconstitutional under the contract and due process clauses of both the State and Federal Constitutions, in so far as it cancelled Plaintiff's right to an additional assessment for the payment of its bonds, said right having been given by the Village charter which was

a part of the 1928 bond contract. For particular allegations of unconstitutionality, see R. 18.

On June 30, 1941, the Supreme Court of the State of Michigan handed down two opinions, one written by Mr. Justice Chandler and concurred in by the five remaining Justices who heard the case, and a second opinion written by Mr. Justice Sharpe and concurred in by four of the five remaining Justices. These opinions are reported in 298 Michigan, 314-330. The Court construed the 1937 and 1939 acts in question as cancelling the city's power to make an additional special assessment to cover fund deficiencies, and held that as so interpreted, said acts were constitutional. Thereupon an order was entered on the same date denying a Writ of Mandamus (R. 28).

IV.

SPECIFICATION OF ERRORS

Appellant, without intention of waiving any of the errors heretofore assigned by it (R. 32-35) but for the purpose of simplifying and combining such assignments, sets forth the following as its specification of errors:

(1) The Supreme Court of the State of Michigan erred in entering its order of June 30, 1941 denying to Plaintiff a Writ of Mandamus as prayed, for the reason that such denial was based upon certain Michigan statutes enacted in the years 1937 and 1939 which, as interpreted by that Court, cancel Plaintiff's contractual right to an additional assessment under a charter provision existing at the time of the issuance of Plaintiff's bonds, and therefore are unconstitutional in so far as they cancel such right, in that they impair the obligation of Plaintiff's contract contrary to the provisions of Section 10 of Article I of the Constitution of the United States and deprive Plaintiff of its property without due process of law contrary to the provisions of the 5th and 14th amendment to said Constitution, the said statutes being

(a) those portions of Act No. 114, Pub. Acts, 1937, and Act No. 282, Pub. Acts, 1939, which amended Section 67 of Act No. 206, Pub. Acts, 1893, by adding the following language to the court decree ordering a tax sale, to-wit:

> "It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the state of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and encumbrances, of whatever kind or nature, cancelled as of such date, unless

any said parcel of land shall be redeemed as provided in act number 206 of the public acts of 1893, as amended, or unless an appeal shall have been taken as provided in act number 206 of the public acts of 1893, as amended, or unless any said parcel of land shall be redeemed by any political subdivision of the state as provided in act number 206 of the public acts of 1893, as amended, for redemption by any person." (Comp. Laws Supp. 1940, Section 3459).

(b) Act No. 155, Pub. Acts, 1937, as amended by Acts Nos. 29, 244 and 329, Pub. Acts, 1939, and particularly Sections 9 and 10 thereof (Comp. Laws Supp. 1940, Sections 3723-9 and 3723-10) which in part are as follows:

"Sec. 9. * * * Any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any encumbrances, except as herein otherwise provided. * * *"

"Sec. 10. All moneys received by the state land office board, * * * shall be credited to the general fund of the state, and shall be paid to the several tax assessing units, including municipalities collecting their own delinquent taxes, in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act, by the board, any county treasurer or the department of conservation. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the state of Michigan."

(Assignments of Error Nos. 1, 3, 4, 5, 6 and 7.)

(2) The Supreme Court of the State of Michigan erred in holding that the above mentioned acts in so far as

they cancelled Plaintiff's contract right to an additional assessment, were constitutional and were not repugnant to the aforesaid provisions of the Constitution of the United States. (Assignments of Error Nos. 1, 3, 4, 5, 6, 7.)

(3) The Supreme Court of the State of Michigan erred in refusing to hold that the above mentioned statutes in so far as they cancelled Plaintiff's right to an additional assessment, were unconstitutional as being repugnant to the aforesaid provisions of the Constitution of the United States. (Assignment of Error Nos. 2, 3, 4, 5, 6.)

V.

ARGUMENT

Summary of Argument

The sole question in this case is as to the constitutionality of the 1937 and 1939 legislation upon which the Michigan Supreme Court based its decision. Appellant's argument as to the constitutionality of such legislation will be developed under the following headings:

(1) Plaintiff has a contract right to an additional assessment to pay its bonds.

(2) Under legislation existing in 1928, the acquisition by the State of Michigan of the absolute title to lands under the tax laws and the subsequent conveyance by the state to a purchaser, would not have destroyed plaintiff's right to an additional assessment to pay its bonds.

(3) The 1937 and 1939 legislation as interpreted by the Michigan Supreme Court, cancels plaintiff's contractual right to an additional assessment to pay its bonds.

(4) The 1937 and 1939 legislation is in violation of that part of Section 10 of Article I of the Constitution of the United States which provides that no state shall pass any law impairing the obligation of contracts.

(5) The 1937 and 1939 legislation is in violation of the 5th and 14th amendments to the Constitution of the United States which prohibit the taking of property without due process of law.

POINT 1

Plaintiff has a contract right to an additional assessment to pay its bonds.

The bonds held by Plaintiff were issued by the Village of Birmingham in the year 1928 (R. 3, 9). These bonds were strictly special assessment bonds, that is, they bear no general obligation of the village (R. 4, 9). They must be paid entirely from special assessments.

Section 24 (1 Comp. Laws, 1929, Section 1786) of Act 278, Pub. Acts, 1909 (Village Home Rule Act) under which the Village of Birmingham was operating at the time of the issuance of Plaintiff's bonds (R. 3), provides in part as follows:

> "Sec. 24. Each village may in its charter provide: * * * (e) for assessing and reassessing the cost, or any portion thereof, of any public improvement to a special district; * * *."

The charter authority to assess the cost of the particular improvement against Special Assessment District No. 146 and to issue bonds in anticipation of the collection thereof is alleged in paragraphs 5 and 6 of Plaintiff's petition (R. 3-4) and admitted in the answer of the Defendants (R. 12) and in the answer of the Intervening Defendant (R. 14).

Section 15 of Chapter XXI of the charter of the Village of Birmingham, which was the charter in effect at the time of the issuance of Plaintiff's bonds, was as follows:

> "Section 15. Should any special assessment prove insufficient to pay for the improvement or work for which it was levied, and the expenses incident thereto, the Commission may make an additional pro rata assessment to supply the deficiency; and in case a larger amount shall have been collected than was necessary, the excess shall be refunded ratably to those by whom it was paid" (R. 6).

It is under the above provision that the Plaintiff claims the right to an additional assessment against the lands in the special assessment district, to supply the deficiency resulting from the non-payment of the original assessments by a portion of the property owners, most of whom have taken advantage of the 1937 and 1939 legislation by repurchasing the property at 25% of the 1938 assessed valuation (R. 13-15) and now claim immunity from any further assessment.

The word "may" used in the above quoted section of the village charter has the same effect as the word "shall," under the well-established rule that "the word 'may' in statutes conferring power upon public officers or official boards or tribunals may be so construed as to be the equivalent of the words 'shall' or 'must' where the public or individuals have an interest in the exercise of the powers conferred." 25 R. C. L. 770-1. The above rule was applied by the Michigan Supreme Court in the case of *Corliss v. Village of Highland Park*, 132 Mich. 152, where that court on page 160 of the opinion said:

> "It is no new doctrine that municipalities will be compelled to do that which their charters give them power to do. Where the law provided that the board of supervisors of a county owing debts which its current revenue was not sufficient to pay 'may, if deemed advisable, levy a special tax not to exceed in any one year one per cent. upon the taxable property,' etc., it was held that the law was mandatory, although permissive in form; that it was the legal duty of the corporation to levy the tax; and that, whenever the public interest or individual rights called for the exercise of this power, courts would compel action. *Supervisors v. United States*, 4 Wall. 435. It was also held in a case very similar to the one now before us that it was the duty of the city to proceed with a new assessment." (Citing *People v. City of Pontiac*, 185 Ill. 437, 445 (56 N. E. 1114)).

The position of the Defendants in respect to the duty upon the part of the City of Birmingham to levy an additional assessment had not the 1937 and 1939 legislation been enacted, is stated on page 319 of the opinion in the following language:

> "Defendants have assumed that it would have been the duty of the city commission to have levied additional deficiency assessments had there been no tax sale * * *."

In *Kadow v. Paul,* 274 U. S. 175, this court had before it for consideration the constitutionality of that part of the Washington diking law which provided for a supplemental assessment to cover a deficiency caused in the original assessment by reason of the non-payment of a part thereof. The opinion in that case concluded with the following language on page 181:

> "Supplemental assessments in providing for the payment for such improvements are recognized as a legitimate part of the proceeding necessary to raise the money and to pay bonds issued to meet the cost and if in the process of collection it shall appear that some of the assessed land fails to pay the assessment and is appropriated and sold, the distribution of the deficit thus arising to be included in another assessment is only meeting the to be expected cost of the improvement. When the operation of the law works uniformly as against all parts of the assessment district and results in a higher cost of the improvement, and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs as long as their benefits continue respectively to exceed their individual assessments."

This court has therefore recognized the legality and necessity of supplemental assessments to pay bonds where some of the original assessments have not been paid.

In *State ex rel. Frazer v. Holt County Court,* 135 Mo. 533 (375 S. W. 521), the plaintiff was granted a writ of mandamus to compel the defendant to levy an additional assessment. The deficiency arose as the result of the non-payment of assessments. The court on pages 545 and 546, said:

> "Neither the relator nor his assignor had anything to do with the matter of the estimate, the assessment, the levy or collection of the tax, and to hold that he is without a remedy and must go unpaid because of a miscalculation or mistake of the county court, or the dereliction and indifference of the collector, or the dodging of the taxpayer, is a proposition that ought to contain its refutation in its mere utterance.
>
> "All the lands benefited can be retaxed whenever it appears that previous assessments are insufficient. Even if the assessment in the first instance was sufficient, if collected, to pay the cash in full, for said improvements, yet if after the allowance of a reasonable time for the collection from delinquents, a deficiency exists, and the legal remedies have been exhausted for the collection of taxes, or if the assessments made have been abandoned or remain uncollected, by the authorities having the matter of the collection in charge, the writ should be granted ordering an additional assessment."

In re Dancy Drainage District, 190 Wis. 327 (208 N. W. 479), the situation was similar to that of the present case. In the Dancy case assessments for construction were levied in amount sufficient, if paid in full, to discharge the principal and interest of the bonds but owing to the fact that assessments against many of the lands in the district remained unpaid and the county had taken tax certificates on such lands, funds enough had not been collected to pay the amount due petitioners on their bonds. At the time

of the issuance of the bonds involved in that case, the statute authorized a reassessment to pay interest only but subsequently the statute was extended to include principal also. The following quotations from the decision in that case indicate that the power to levy additional assessments for the payment of principal on bonds existed even prior to the amendment. The court on pages 332-333 said:

> "When it is borne in mind that, in an area as large as the ordinary drainage district and including lands of very different values and very differently benefited, non-payment of assessments is almost certain to occur, it will be seen that some scheme for making up the deficit occasioned by such non-payment must exist in order to collect the amount due on outstanding bonds where, as here, they equal ninety-five per cent of the first total cost of construction.
>
> "Another fact must be borne in mind also, and that is that bonds issued nearly up to the total assessment for construction, as they usually are because the district has no money except as it is raised by assessments, would not be salable in the market, for there would be no adequate margin of security. For these reasons it is apparent that the legislative scheme, whether so in terms expressed or not, must have included the right to additional assessments up to the limit placed by the assessment of benefits for the payment of principal and interest due on lawful debts incurred by the district. That in terms is the scheme since the amendment of 1913 to sub. (1), Sec. 89.44."

In answer to an argument that a further assessment would be inequitable, the court on page 336 said:

> "It is also urged that it is inequitable to levy further assessments because those who pay will

have to pay more than their share—some not having paid at all. This is true, but it is a species of inequity that exists wherever there is a joint liability and one that exists as to the levy of general taxes. Whenever there is a failure to collect all general taxes there is a loss that must be borne by those who pay, but that does not release them from the burden of meeting the obligations jointly due. *State ex rel. Soutter v. Madison,* 15 Wis. 30."

POINT 2

Under legislation existing in 1928, the acquisition by the State of Michigan of the absolute title to lands under the tax laws and the subsequent conveyance by the State to a purchaser, would not have destroyed plaintiff's right to an additional assessment to pay its bonds.

Under the village charter, delinquent special assessments along with delinquent village taxes, were returned to the county treasurer for collection under the general tax laws (R. 5). Thereafter the general tax laws relative to the collection of such special assessments and the sale and redemption of property for the non-payment thereof, were applicable. (1 Comp. Laws, 1929, Sections 3500-3501) *Auditor General v. Maier*, 95 Mich. 127.

In 1928 when the bonds in question were issued, Section 127 of Act No. 206, Pub. Acts, 1893, as amended (1 Comp. Laws, 1929, Section 3520), provided that "whenever it shall appear by the records in the auditor general's office that any lands are delinquent for taxes for five (5) years or more and that said lands have been bid off to the state one (1) or more times by reasons of such delinquent taxes, and that the time of redemption of such sale or sales has expired and that no application has been made to pay, to redeem or purchase the same, and it shall appear that no action is pending in the circuit court of the county where said lands are situated to set aside the taxes or remove the cloud on the title occasioned thereby, the title to the state shall be deemed absolute in and to said lands." Said section then provides that such lands shall, upon certain designated conditions, be transferred by deed to the State of Michigan as to an individual and that "upon the execution and delivery of said deed or deeds to the director of conservation, said director shall hold said

lands as state lands subject to the provisions hereinafter contained."

The title held by the state upon such conveyance is defined in *Alcona County Supervisors v. Auditor General*, 136 Mich. 130, on page 133 as follows:

> "We thinks all of these provisions, taken together, when read in connection with the other provisions of the state tax law, to which references need not be given, indicate that the whole theory of the taxing laws is to vest the title in the state, as between itself and the original owner, but for the state, county, and township, in proportion to the several taxes due to each."

(Under the tax laws the above mentioned trust would apply to village and city taxes where returned to the county treasurer.)

Section 130 of said Act (1 Comp. Laws, 1929, Section 3524) specifies the effect of such a deed upon outstanding taxes. This was the only statutory provision existing prior to 1937 which defined the effect of such a deed to the State of Michigan. So far as pertinent to this case, said section reads as follows:

> "*All taxes charged against such lands in the office of the auditor general at the time they are deeded to the state shall be cancelled,* • • •. The supervisor shall omit and cancel from his assessment roll all said lands so deeded to the state, • • • and said lands so deeded as aforesaid shall not be liable to any assessment for any purpose until the same are again sold and deeded by the state, and notice of said sale and deeding given to the county treasurer by the commissioner of the state land office, as hereinafter provided." (Italics ours.)

The word "taxes" as used in the above section has never been construed by the Michigan Supreme Court as

including special assessments. In *Case v. City of Saginaw*, 196 Mich. 687, the Supreme Court of Michigan divided evenly upon the question of whether said section applied to special assessments. The particular issue then before the court was whether or not the yearly installments of a special assessment which were a lien upon the property at the time it was deeded to the state under the general tax law, but which had become due subsequent to the time the state conveyed the property to the plaintiff, had been cancelled. The Circuit Court held that no such cancellation had taken place, which decision was affirmed by an equally divided court. Three of the justices held that the above section did not apply to a special assessment. A fourth justice held that installments which were a lien upon the property at the time the state acquired title but which did not become due until after the state had parted with the title, were not cancelled. The remaining four justices held that future due installments were cancelled. The decision of the latter justices was predicated upon the fact that a lien for the special tax existed at the time the state acquired title to the lands in the tax proceedings.

The *Saginaw* case, however, is not parallel to the present case because of the fact that the special assessments in that case, even though due in future years, were a lien upon the property at the time it was deeded to the state and were actually in existence, whereas, the yet unlevied special assessment sought in the present case, was of course not in existence either when the state acquired title in November, 1939 or when the state sold the property in 1940.

That an additional assessment to cover a deficiency is not a lien upon the land prior to the levy thereof, was established by this court in *Mullen Benevolent Corporation v. United States*, 290 U. S. 89. In that case the United States Government purchased lands against which

there were outstanding special assessments which assessments were paid by the Government at the time of purchase. Subsequently an additional assessment was levied because of a deficiency in the collection of the original assessments, which additional assessment covered properties previously purchased by the Government. This court on page 95 said:

> "What has been said shows that the respondent did not take or destroy any lien belonging to the petitioner. None remained upon the land, when the purchases were consummated. The reassessments were the result of proceedings begun thereafter. They were ineffective to create a lien upon lands owned by the government. *United States v. Buffalo*, 54 (F.) (2d) 471."

There is no decision by the Michigan Supreme Court upon the question of the effect upon non-existing additional assessments, of a tax deed to the State of Michigan under laws existing prior to 1937.

Assuming for the sake of argument that the word "taxes" as used in said Section 130 is to be construed as including special assessments, then let us examine the provisions of that section to determine exactly what special assessments are to be cancelled thereunder. The first sentence of the section so far as pertinent to this discussion is as follows:

> "All taxes charged against lands in the office of the auditor general at the time they are deeded to the state shall be cancelled, * * *."

No attempt is made under that section to cancel any taxes which are not charged against the lands in the office of the auditor general. Under the state tax laws, taxes are returned to the county treasurer on March 1st following the time when they become delinquent. The county

treasurer prior to 1937 was required to file a transcript of such returned taxes in the office of the auditor general on or before the first day of May next after such return (1 Comp. Laws, 1929, Section 3448). Therefore, no tax or special assessment could be charged against lands in the office of the auditor general until first such tax or special assessment had been levied and had been returned as delinquent to the country treasurer.

In the present case the additional assessment has not yet been made and therefore was not charged against the lands in the office of the auditor general at the time such lands were deeded to the state in November, 1939. Therefore under the laws existing at the time of the issuance of plaintiff's bonds and up to the passage of the 1937 legislation, plaintiff's right to an additional assessment would not have been cancelled inasmuch as said Section 130 (the only statutory provision relative to cancellation) did not cancel any taxes which were not charged in the office of the auditor general.

Under said Section 130 exemption from "assessment for any purpose" extended only to the time the lands were again sold and deeded by the state. There is no prohibition against an additional assessment after the title has been transferred to a private owner.

This case was decided by the Michigan Supreme Court upon the basis that the 1937 and 1939 legislation (and not any prior legislation) cancelled plaintiff's right to an additional assessment.

POINT 3

The 1937 and 1939 legislation, as interpreted by the Michigan Supreme Court, cancelled Plaintiff's contractual right to an additional assessment to pay its bonds.

The basis of the defense in the State Supreme Court and also of the decision of that court, was the language added to the form of decree to be entered for the sale of the property for tax delinquencies, by Act No. 114, Pub. Acts, 1937 and Act No. 282, Pub. Acts, 1939 (Comp. Laws Supp. 1940, Section 3459) and Sections 9 and 10 of Act No. 155, Pub. Acts, 1937, as amended by Act No. 244, Pub. Acts, 1939 (Comp. Laws Supp. 1940, Sections 3723-9 and 3723-10). *Municipal Investors Association v. Birmingham*, 298 Mich. 323-5.

Prior to 1937, Section 67 of Act No. 206, Pub. Acts 1893 (1 Comp. Laws, 1929, Section 3459) provided for a decree by the chancery court which simply ordered the sale of properties set forth in the auditor general's petition but did not prescribe the effect of such a sale. The said 1937 and 1939 amendments to Section 67 added to the form of decree to be entered by the circuit court, the following provision:

> "It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the State of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and incumbrances, of whatever kind or nature, cancelled as of such date, * * *."

Said Act No. 155, Pub. Acts of 1937, was a new act which created the State Land Office Board and provided for the auction sale of properties, the title to which had become

vested in the state under the tax laws, at not less than 25% of their assessed valuation for the year preceding the vesting of title in the state. Section 9 thereof contains the following provision:

> "Any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any incumbrances, except as herein otherwise provided."

Section 10 of said act, as amended by Act No. 244, Pub. Acts, 1939, provides for the distribution of the receipts of moneys by the State Land Office Board among the several tax assessing units "in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act" and then concludes with the following sentence:

> "Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the State of Michigan."

In the Michigan Supreme Court the Defendants contended that by virtue of the above statutory provisions enacted in 1937 and 1939, Plaintiff's right to an additional special assessment was cancelled. Plaintiff argued that the additional assessment was not yet a lien under *Mullen Benevolent Corporation v. United States,* 290 U. S. 89, and therefore was not cancelled. In denying our contention, the Michigan Court in the opinions written by both Justices Chandler and Sharpe, stresses the fact that the above 1937 and 1939 legislation provided that the deed to the State of Michigan and the deed from the State of Michigan to the purchaser, conveyed title "free from any incumbrances." In the opinion written by Mr. Justice

Sharpe it is admitted that "it is the general rule that a special assessment does not become an incumbrance until it has become a lien against the premises" but after defining incumbrance, the conclusion is reached that "under the above definition of an incumbrances it would naturally follow that *the possibility of a reassessment would constitute an incumbrance* and thus be cancelled." (Italics ours.)

Prior to 1937, the only cancellation provided for under the tax laws was the cancellation of taxes charged against the property in the office of the auditor general at the time it was deeded to the state (1 Comp. Laws, 1929, Section 3524). Certainly under such prior laws the "possibility of a reassessment" was not an assessment charged in the office of the auditor general. The 1937 and 1939 legislation (as interpreted by the Michigan Court in this case) went beyond the former laws when it cancelled even the "possibility" of an additional assessment. It was, therefore, this 1937 and 1939 legislation which cancelled Plaintiff's right to an additional assessment, according to the Michigan Supreme Court.

POINT 4

The 1937 and 1939 legislation is in violation of that part of Section 10 of Article I of the Constitution of the United States which provides that no state shall pass any law impairing the obligation of contracts.

Bonds payable solely from the collection of special assessments have been issued all over the United States for the purpose of providing funds with which to make public improvements. In some cases these bonds pledge the full faith and credit of the issuing municipality but in the present case, as well as in many other cases in Michigan and in other states, no such pledge has been made. It is evident therefore that if bonds payable solely from the collection of special assessments do not carry with them any right to an additional assessment in case of a deficiency in the fund from which they are payable, such bonds would seldom be paid in full. Certainly no person would purchase such a bond without an accompanying right to an additional assessment. This court recognized the necessity of such right in *Kadow v. Paul, supra,* and expressed itself very strongly in that respect.

In the present case the Village of Birmingham not only pledged the original special assessments to the payment of the bonds but also by charter provided for an additional assessment to supply a possible deficiency. It is agreed by all the parties in the present case that the original assessments already collected and any possible future collections thereof will not be sufficient to pay the outstanding bonds. Therefore, the only remaining remedy of the bondholders lies in an additional assessment; but that remedy will be destroyed under the 1937 and 1939 legislation unless this court reverses the decision of the state court.

Following periodical cancellations of interest and penalties on delinquent taxes, extensions of time within which to pay such taxes, and a suspension of annual tax sales during the years 1933 to 1937, both inclusive, the Michigan Legislature in 1937 provided for the resumption of annual tax sales beginning in 1938 (Comp. Laws Supp. 1940, Section 3451). As a result of various changes in statutory provisions which were designed to discourage the purchase of lands at tax sales by private buyers, (*) there were as anticipated few such buyers at the 1938 sale. An exceedingly large number of properties were bid in to the State of Michigan at that sale for the lack of any other bid. Under the Michigan law it is necessary for a private buyer at a tax sale to bid and pay the full amount of the taxes for which the property is being sold. (1 Comp. Laws, 1929, Sec. 3462; Comp. Laws Supp. 1940, Sec. 3462) From the standpoint of the collection of taxes, it is therefore desirable that property be sold to a private bidder rather than to be bid in to the State of Michigan. As will be seen from the following discussion, the laws in force at the time of the 1938 sale first discouraged the property owner from paying his taxes before it went to tax sale and then discouraged any bid at that sale.

At the same session in 1937, the legislature also enacted Act No. 155, Pub. Acts, 1937 (Scavenger Sale Act) by which it created the State Land Office Board and authorized that board to sell at public auction lands (located in the southern half of the lower peninsula), the title to

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*In addition to those changes hereinafter referred to, the amount necessary to be paid by an owner to a tax title purchaser for a reconveyance after the expiration of the period of redemption, was reduced in 1932 from 100% additional (1 Comp. Laws, 1929, Section 3536) to 50% additional (Act 10, Pub. Acts, 1932, First Extra Session) and again in 1937 to 10% additional (Act 283, Pub. Acts, 1937).

which had become absolute in the State of Michigan by reason of the fact that such lands had been bid in to the State of Michigan at a tax sale and had not been redeemed within the period provided therefor. The effect of this act was that the lands bid in to the State of Michigan at the tax sale in 1938 and which were not redeemed during the following eighteen months' redemption period (which includes the lands involved in this litigation) were sold by the State Land Office Board beginning in February, 1940.

The so-called Scavenger Sale Act gave former owners particular advantages over strangers to the title. Strangers were required to pay for the property within twenty-four hours of the sale whereas former owners could purchase on land contract with payments extended over not to exceed ten years. If a stranger to the title was the successful bidder, then under the statute the former owner could purchase the property by matching the bid within thirty days and in such case could also purchase upon a land contract if he so desired. This provision would naturally result in a former owner refusing to over-bid a stranger to the title at the auction sale, thereby permitting the former owner to purchase the property within thirty days thereafter at the lowest possible price, in fact, a price lower than that which he perhaps would have been willing to pay for the property had he been required to compete with a stranger to the title at the auction sale. Under such a provision of the statute, the bid price might be considerably less than the true market value. Also, the effect of throwing so many properties on the market at the same time tended to force down the sale price.

The provision of the statute permitting a former owner to match the bid of a stranger to the title, also naturally

deterred strangers from bidding at the sale. After a stranger to the title had spent considerable time and perhaps money in investigating properties upon which he intended to bid, had attended the sale, secured the award of the properties and deposited his money within twenty-four hours, even then he had no assurance that he could obtain a deed. If a former owner matched his bid, then his only redress was the return of the amount he paid in, without interest; he received no remuneration of any kind for the time and money he might have spent in investigating the properties and for the use during the thirty days of the money which he had deposited and, in the meantime, his money had been tied up and was not available for the purchase of other properties.

We have recited the foregoing for the purpose of calling attention to the fact that what the statute called an auction sale was, in fact nothing of the kind because the incentive for competition was removed. To many owners, the Scavenger Sale was the bargain counter upon which they could profit by settling their tax obligations at a material discount.

The above mentioned 1937 legislation was adopted a year before the 1938 tax sale and about two and one-half years before the 1940 Scavenger Sale. Such legislation laid out a very definite program whereby the property owner delinquent in the payment of his taxes, could settle such taxes at a discount. In effect, it constituted an invitation to him to let his taxes go unpaid, to permit his property to be sold at the 1938 tax sale, and to fail to redeem the same within the eighteen months' redemption period, whereupon he could then repurchase his property at far less than the accumulated taxes. With such an invitation to the delinquent taxpayer, it is no wonder that a large amount of property went through the Scavenger Sale.

The Michigan Legislature, however, was not satisfied to stop here. It went a step further and cancelled not only the existing taxes including future due installments of existing special assessments, but also, in accordance with the interpretation placed upon the statutes by the Michigan Supreme Court, removed any liability for a yet unlevied additional or supplemental special assessment which might be necessary to repay the money which was borrowed for the purpose of improving the property.

It is this latter phase of the 1937 and 1939 legislation with which we are concerned in this case, that is, the cancellation of plaintiff's right to such an additional assessment. This case therefore involves the constitutionality of statutes which destroy the last remaining remedy of the bondholder—a remedy which was established by contract and which is necessary if the bond contract is to be performed.

The decisions of this court have well established the principle that the means established for the enforcement of a contract, by laws existing at the time the contract was entered into, forms a part of such contract and under the provisions of the federal constitution cannot be impaired. The following cases sustain the above principle as applied to contract rights of municipal bondholders:

Von Hoffman v. City of Quincy, 4 Wall. 535;
State of Louisiana v. City of New Orleans, 102 U. S. 203;
Wolff v. City of New Orleans, 103 U. S. 358;
Ralls County Court v. United States, 105 U. S. 733;
Mobile v. Watson, 116 U. S. 289;
Louisiana v. Pillsbury, 105 U. S. 278;
Seibert v. Lewis, 122 U. S. 284;

Louisiana ex rel. Hubert, Receiver, v. City of New Orleans, 215 U. S. 170;
Hendrickson v. Apperson, 245 U. S. 105;
W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56 (55 Sup. Ct. 555, 97 A. L. R. 905).

In some of the foregoing cases the impairment went to the extent of only making the remedy less efficacious and yet the statutes were held to be unconstitutional. The present case, however, is much stronger against constitutionality because of the fact that the acts in question absolutely destroy any further remedy.

As illustrative of the above decisions, we quote from *Louisiana ex rel. Hubert, Receiver, v. City of New Orleans,* 215 U. S. 170, 178, where this court said:

> "The power of taxation conferred by law entered into the obligation of the contracts, and any subsequent legislation withdrawing or lessening such power, leaving the creditors without adequate means of satisfaction, impaired the obligation of their contracts within the meaning of the Constitution. *Memphis v. U. S.,* 97 U. S. 293; *Von Hoffman v. City of Quincy,* 4 Wall. 535; *Seibert v. Lewis,* 122 U. S. 284; *Mobile v. Watson,* 116 U. S. 289; *Scotland County Court v. Hill,* 140 U. S. 41."

In *Wolff v. City of New Orleans,* 103 U. S. 358, the argument was made that the taxing power belongs exclusively to the legislative department of the government and when delegated to a municipal corporation may, equally with other powers of the corporation, be rejected or restricted at the pleasure of the legislature. In answer to that argument, the court on page 365 of the opinion said:

> "It is true that the power of taxation belongs exclusively to the legislative department, and that the Legislature may at any time restrict or revoke

at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement."

The principles established in the above cases were reaffirmed in the recent case of *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56 (55 Sup. Ct. 555; 97 A. L. R. 905), where this court held invalid an Arkansas statute on the ground that it impaired the obligation of the bondholders' contract. The plaintiff in that case was the holder of certain bonds secured by a mortgage upon benefit assessments against property within the improvement district. An act adopted in 1933, after the issuance of the bonds, provided for certain delays in the enforcements of the assessments and reduced the penalties. These are set forth on pages 58 and 59. The Court in its opinion delivered by Mr. Justice Cardozo, beginning on page 60, said:

"To know the obligation of a contract we look at the laws in force at its making. *Sturges v. Crowinshield*, 4 Wheat. 122, 197, 4 L. Ed. 529, 549; *Home Bldg. & L. Asso. v. Blaisdell*, 290 U. S. 398, 429, 78 L. Ed. 413, 423, 54 S. Ct. 231, 88 A. L. R. 1481. In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. Ed. 93, 16 S. Ct. 1042; *cf. Home Bldg. & L. Asso. v. Blaisdell, supra* (290 U. S. 429, 434, 78 L. Ed. 423, 426, 54 S. Ct. 231, 88 A. L. R. 1481), where the cases are assembled.

The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. *W. B. Worthen Co. v. Thomas,* 292 U. S. 426, 433, 78 L. Ed. 1344, 1346, 54 S. Ct. 816, 93 A. L. R. 173, distinguishing *Home Bldg. & L. Asso. v. Blaisdell,* 290 U. S. 398, 78 L. Ed. 413, 54 S. Ct. 231, 88 A. L. R. 1481, *supra.* • • •

"Under the statutes in force at the making of the contract, the property owner was spurred by every motive of self-interest to pay his assessments if he could, and to pay them without delay. Under the present statutes he has every incentive to refuse to pay a dollar, either for interest or for principal. • • •

"Whether one or more of the changes effected by these statutes would be reasonable and valid if separated from the other, there is no occasion to consider. A state is free to regulate the procedure in its courts even with reference to contracts already made (*Bronson v. Kinzie,* 1 How. 311, 11 L. Ed. 143), and moderate extensions of the time for pleading or for trials will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up so as to make the remedy a shadow. • • • What controls our judgment at such times is the underlying reality rather than the form or label. The changes or remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attracticeness and value to collateral security."

It is significant that the opinion in the above case was written in 1935 during the depression and when there existed all of the economic circumstances recited on pages 320-21 of the reported opinion of the Michigan Supreme Court in the present case. The Arkansas act in the *Worthen* case did not attempt to absolutely destroy the bondholders' remedy. In fact there was no one change which alone might have rendered the act invalid. It was rather an accumulation of many changes in the law which made the remedy a "shadow." If the Arkansas act was unconstitutional, then the Michigan acts which go further and destroy the remedy absolutely, must be unconstitutional. For this court to sustain the Michigan acts would necessitate the over-ruling of the decision in the *Worthen* case.

In the first part of the discussion under this heading we called attention to the fact that the statutes herein involved took from the property owner the incentive to pay his taxes. Applicable, indeed, to the situation in the present case was the following statement made by Mr Justice Cardozo in the *Worthen* case:

> "Under the statutes in force at the making of the contract, the property owner was spurred by every motive of self-interest to pay his assessments if he could, and to pay them without delay. Under the present statutes he has every incentive to refuse to pay a dollar, either for interest or for principal. * * *" (Page 60).

We know of no case where this court has hesitated to declare invalid state statutes which destroyed substantial remedies. Some state statutes have been sustained where the remedy was not materially affected but none where the remedy was destroyed as in the present case.

Recently there has been considerable discussion in cases before this court as to the effect of the reserved police power. Those cases, however, represent no change

in the fundamental principles in respect to the contract clause of the constitution. That the contract clause of the constitution and the reserved police power must be construed in harmony with each other, is not a new doctrine. See cases cited in *Home Bldg. & L. Asso. v. Blaisdell*, 290 U. S. 398, 435-438. In that case, after reviewing the various pronouncements of this court, Mr. Chief Justice Hughes on page 439 said:

> "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principal precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community."

Notwithstanding the fact that in some of the recent cases, this court may have stressed the reserved police power, yet in no case has it permitted a state statute to absolutely destroy all remedies available to the creditor.

In the *Blaisdell* case, no attempt was made by the Minnesota statute to destroy the remedy of the mortgagee. The mortgagee's remedy was modified only to the extent that the period of redemption was extended to such additional time as the court might deem just and equitable but in no event beyond May 1, 1935, conditioned, however,

that the mortgagor during the extended period should pay the rental value of the premises as ascertained in judicial proceedings, such amount to apply upon the principal and interest of the mortgage indebtedness. That the court had no intention of countenancing statutory modification of contracts in vital particulars, is evidenced by the following language on pages 445-6 of the opinion:

> "The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the Act was obviously to give a reasonable opportunity for the authorized application to the court. As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. * * * The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief."

As bearing upon the interpretation to be placed upon the opinion in the *Blaisdell* case in its application to the remedies of municipal bondholders, we think it significant that subsequent thereto this court by unanimous decision in *W. B. Worthen Company v. Kavanaugh, supra,* declared unconstitutional a state statute far less objectionable than those involved in the present litigation.

A class of cases in which this court has sustained state statutes under the doctrine of the reserved police power, are those involving statutes regulating deficiency judg-

ments in mortgage foreclosure cases, the most recent being *Gelfert v. National City Bank,* 313 U. S. 221. Those decisions have been confined to cases where the mortgagee became the purchaser at the foreclosure sale. (This court in the *Gelfert* case stated that it intimated no opinion on the question of constitutionality as applied to a case where the mortgagee is not the purchaser.) The opinion in the Gelfert case concludes on page 234 as follows:

> "In conclusion, the statute in question, like the one involved in *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co., supra,* p. 130, 'cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full.' Here, as in that case, the obligation of the mortgagee's contract is recognized; the statute does no more than limit 'that right so as to prevent his obtaining more than his due.'"

The foregoing quotation distinguishes that case from the one now before this court.

In *Wood et al. v. Lovett,* 313 U. S. 362, certain lands were sold in 1933 for the non-payment of the 1932 taxes. The owner failed to redeem and the land was certified to the State of Arkansas as owner. In 1936 it was conveyed by the State to Wood et al. Act 142 of 1935 provided that tax deeds should not be set aside for certain irregularities. In 1937 this act was repealed. In 1939 the corporation which owned the property at the time of the tax sale, deeded the same to Lovett who in that action sought to quiet his title, claiming certain irregularities in the tax sale. Wood et al. defended their title solely upon the basis of the 1935 act, claiming that the 1937 repealing act impaired the obligation of their contract. The majority of this court held that the 1937 repealing act was unconstitutional for the reason claimed. Three of the justices dissented upon the ground that the Arkansas

statute "comes well within the permissive area of state legislation as that area is defined by the Blaisdell case and the decisions upon which that case rests." In the dissenting opinion written by Mr. Justice Black, attention is called to the fact that "at the time of the forfeiture and the sale to the state, Arkansas law protected the purchaser by providing that he should be reimbursed and made whole in case his tax purchase was set aside for irregularity;" that "the repealing act of which appellants complain did not take away any part of that right"; that "the whole course of legislation in Arkansas shows a desire to be fair both to the purchaser of tax forfeited land and to the former owners whose land is about to be lost by reason of drastic device of forfeiture." In the present case there was no such attempt on the part of the Michigan legislature to be fair to the bondholder and to assure him of the return of his money. On the contrary the Michigan legislation prevented the return of the bondholder's money. The reasoning of the dissenting justices is therefore not applicable here.

In concluding our discussion of the decisions of this court upon the contract clause of the Constitution, we believe we can say without fear of contradiction that every opinion of this court (whether majority or minority) has adhered to the principle laid down by Mr. Chief Justice Hughes on page 439 of the opinion in the *Blaisdell* case, who after declaring that the contract clause and the reserved police power must be construed in harmony with each other, said:

> "This priciple precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them."

In the following cases subordinate federal courts and state courts have held state statutes to be unconstitutional in that they violated the bondholders' contract rights. In some of the cases the violation was very similar to that complained of here.

Nelson v. Pitts, 126 Okla. 191 (53 A. L. R. 1137);

Borough of Fort Lee, N. J., v. United States, C. C. A. (3rd Circuit) (1939), 104 Fed. (2d) 275;

Brown-Crummer Inv. Co. v. Paulter, C. C. A., (10th Circuit) (1934), 70 Fed. Rep. (2d) 184:

Moore v. Branch, (Dist. Ct. S. D. Florida, Ocala Division) (1934), 5 Fed. Supp. 1011, (Before Bryan, Circuit Judge, Ritter and Strum, District Judges);

People ex rel. Equitable Life Assur. Soc. of United States v. Pierce, (Sup. Ct. App. Div.), 176 N. Y. Supp. 412;

Islais Co., Limited, v. Matheson, (California) (1935), 45 Pac. (2d) 326;

Straughn v. Berry (Oklahoma) (1937), 65 Pac. (2) 1203;

Read v. Beczkiewicz, (Indiana) (1939), 18 N. E. (2d) 739;

State ex rel. Sherril v. Milam (Florida) (1933), 153 So. Rep. 100;

Dallas County Levee Improvement Dist. No. 6 v. Rugel (Comm. of Appeals of Texas) (1931), 36 S. W. (2d) 188;

State v. Port of Palm Beach District (Florida) (1935), 164 So. 851;

In re Special Assessments for Paving District No. 3, in City of Golden (Colorado) (1939), 95 Pac. (2d) 806;

In re Cranberry Creek Drainage District (Wisconsin) (1930), 231 N. W. 588;
Atwood, et al. v. Kelley, et al. (Court of Civil Appeals of Texas) (1939), 127 S. W. (2d) 555.

It will be noted that in many of the above cases, *W. B. Worthen Company v. Kavanaugh, supra,* is cited.

For declarations of the Michigan supreme court in respect to contract rights of municipal bondholders, see *Board of Education of the City of Lincoln Park v. Board of Education of the City of Detroit,* 245 Mich. 411, 414; *Thompson v. Auditor General,* 261 Mich. 624, 657.

The decision by the Michigan court in the present case is based largely upon the fact that the court declared the acts in question to be constitutional in the case of *Baker v. State Land Office Board,* 294 Mich. 587. We desire to emphasize that in the *Baker* case there was under discussion only those "tax liens and assessments already assessed and levied" (page 599). The question here was not considered in that case. On page 323 of the reported opinion in this case, the court quotes from its opinion in the *Baker* case as follows:

> "In addition to our determination as above expressed, it can be said that such purchasers can be assumed to have purchased with knowledge that the lien upon the property securing such taxes and assessments might be displaced."

If the court intended that the above quoted statement should be applicable to the present situation (notwithstanding that an unlevied assessment creates no lien* and that the additional assessment was destroyed and not displaced), then we know of no decision to substantiate

*Mullen Benevolent Corporation v. United States, 290 U. S. 89.

that statement. It is absolutely contrary to the repeated pronouncements of this court. On the contrary, every purchaser of bonds takes the same with the knowledge that the Constitution of the United States absolutely prohibits the destruction of his substantial contract rights.

An additional assessment to supply a deficiency in the funds of the district is the means by which the district fulfills its obligation to pay its bonds. In the case of the general obligation bonds of a municipality, if a delinquency results in the collection of taxes for any interest or principal payment, then the municipality is obligated to levy the amount of the deficiency upon the next tax roll. Such a levy is comparable to an additional special assessment. If the legislature can cancel the right to an additional special assessment to pay a special assessment bond, then why can it not cancel the right to such a second tax levy to pay a general obligation bond? If that can be done, then the pledging of the full faith and credit of the various cities and other political subdivisions of the United States will be a nullity. It was to prevent just such a situation that the contract clause was originally place in our Constitution. *Home Building and Loan Assn. v. Blaisdell,* 290 U. S. 398, 427.

The decision of the Michigan court is especially detrimental to the contract rights of persons holding bonds last maturing in any issue. The fact is well illustrated by the present case. When the bonds of this issue were originally sold, no preference was intended as to any bond, yet as a result of the Michigan decision, we have a situation where the first bond maturities have been paid in full and the bonds of the later maturities left without any means of payment whatsoever, not because the city did not make adequate provision for the payment of the last as well as the first maturities, but because the legislature subsequently destroyed the means of payment.

Even though the 1937 and 1939 legislation should be declared unconstitutional to the extent that we herein contend, that would not deprive the property owners of those benefits accruing from the cancellation of general taxes and *existing* special assessments. It would simply mean that in those cases where an additional assessment should be necessary to pay bonds, that such an assessment could be levied against all the property in the district, including both those lands upon which the assessments had been paid and those lands upon which the assessments had been cancelled either in whole or in part. Such would be the equitable procedure.

Special assessments are levied upon the basis that the improvements benefit the property assessed and that the benefited property should pay the cost thereof. Under the 1937 and 1939 legislation, however, the property owner can retain the benefits and at the same time relieve himself of any liability therefor. He can sell his property at an enhanced price resulting from the improvement and thereby enrich himself at the expense of the bondholder.

We do not take the position here that the acts in question should be declared invalid in their entirety but only as they prevent additional assessments necessary to pay outstanding bonds where the right to such additional assessments existed at the time of the issuance of the bonds. In *Baker v. State Land Office Board, supra,* we filed a brief *amici curaie* upon the question of the constitutionality of the Scavenger Sale Act as it applied to *outstanding* special assessments. In that brief we did not attack the title of the act as might be inferred from the reported opinion in the present case (page 323). That was done by other counsel. We concluded our brief in the *Baker* case with this statement:

> "We do not take the position that the act should be declared unconstitutional in its entirety. In its

application generally, it does not affect contract rights. We insist, however, that contract rights should be protected by this court in any opinion rendered in this case, and that where there are outstanding bonds payable from special assessments only, that the constitutionality should be limited to those cases where there exists a valid and adequate right to reassess against all the lands in the special assessment district, the amount of any deficiency resulting from the cancellation of special assessments under the act."

In this case we have what we referred to in our brief in the *Baker* case, *i. e.*, the right to an additional pro rata assessment to supply the deficiency resulting from the non-payment of special assessments by a large percentage of the property owners, which right we contend still exists, and that the statutes in question in so far as they attempt to destroy that right, are repugnant to the contract clause of Section 10 of Article I of the Constitution of the United States.

POINT 5

The 1937 and 1939 legislation is in violation of the 5th and 14th amendments to the Constitution of the United States which prohibit the taking of property without due process of law.

While primarily the statutes herein involved violate the contract clause of the Constitution, yet they also are repugnant to the due process clauses of the 5th and 14th amendments. The contract right to an additional assessment is property. The statutes in question deprive plaintiff of such property and therefore are in violation of the due process clauses of the above mentioned amendments. *Lynch v. United States,* 292 U. S. 571; *Treigle v. Acme Homestead Association,* 297 U. S. 189. In the *Lynch* case this court on page 579 said:

> "Second. The 5th amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the 5th amendment."

CONCLUSION

In conclusion, we submit that for the reasons hereinbefore set forth, the judgment of the Supreme Court of the State of Michigan should be reversed and that said cause should be remanded to the Supreme Court of the State of Michigan for such additional action by said court as may be necessary in order that appellant may have the relief prayed for in its petition for a writ of mandamus

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